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PERSONAL DATA PROTECTION FOR SOLE TRADERS

1. INTRODUCTION

Personal data protection for natural persons is a very interesting issue, both in terms of its legal nature and from a practical point of view, as data sharing and data processing concerns every business, especially in the context of public registers of sole traders, like the Central Register and Information on Economic Activity¹. However, qualifying such information as personal data as understood in the Act on Personal Data Protection of 29 August 1997² is a highly complicated issue. Therefore, it is worth analysing the legal regulations, which have been changing in the recent years, as well as the hitherto judicial practice in this area.

2. PERSONAL DATA OF SOLE TRADERS

Personal data protection is inseparably connected with the constitutional right to privacy³. The “privacy” feature can be assigned to practically all data regarding an identified or identifiable person. This information may concern “various aspects of life” as long as it is possible to assign them to a specific person⁴. However, the theory and practice did not agree on the qualification of personal data of sole traders as personal data understood under PDPA, mostly due to the common availability of the sole traders’ data resulting from the public openness of registers and economic turnover freedom.

According to some representatives of the doctrine of law, information regarding self-employed individuals are protected by PDPA whether they are publicly accessible or not. The most important thing is that they identify specific persons⁵. The most

¹ The procedures and rules for establishing and running economic activity are set out in the Act on Freedom of Business Activity of 2 July 2004 (Journal of Polish State Law 2004, No. 173, item 1807 as amended). Hereinafter referred to as: FBA. According to that act, all activities related to the entry in the Central Register and Information on Economic Activity (hereinafter referred to as: CEIDG) are operated by the Ministry for Economic Development of the Republic of Poland.

² Consolidated text Journal of Polish State Law 2014, item 1182. Hereinafter referred to as: PDPA.

³ R. OWERCZUK, *Ochrona danych osobowych na gruncie Konstytucji Rzeczypospolitej Polskiej*, “Czas Informacji” 2012, No. 4 (12), pp. 92–96.

⁴ J. BARTA, R. MARKIEWICZ, *Wprowadzenie*. In: *Ochrona danych osobowych*, Kraków 2002.

⁵ A. MEDNIS, *Ustawa o ochronie danych osobowych. Komentarz*, Warszawa 1999, p. 25; S. GRYNHOFF, P. WOŹNY, *Ochrona danych osobowych w praktyce. Wzorcowe pisma, instrukcje i procedury dla przedsiębiorstw i instytucji publicznych*, ed. P. WOŹNY, Poznań 2000, p. 2; A. SZEWC, *Z problematyki ochrony danych osobowych*, “Radca Prawny” 1999, No. 3, p. 24.

important polemic came from the Chief Inspector for Personal Data⁶, who stressed that such data should not be protected by PDPA as the register of one-man businesses is only a collection of data of sole traders who register their businesses⁷. Therefore, anyone who launches a business must accept that their data present in publicly accessible registers are under limited protection. PDPA regulations are not valid for processing information on subjects who run one-man businesses to the point where they identify the subject in trade and are closely connected with its business. As a result, anyone who decides to open such a business agrees to limit their right to privacy to a larger extent⁸. Similar opinions were shared in the judiciary. In some jurisdictions of the Supreme Administrative Court⁹, it was agreed that, although Article 1 (1) PDPA indicates that everybody has the right to have their personal data protected, it does not cover widely understood business activity. Such a solution is beneficial for the certainty of economic turnover. It does not signify the exclusion of protection, but limits protection in areas directly connected with business activity¹⁰.

On 1 January 2004, i.e. with introduction of Article 7a (2) of the Business Activity Act from 19 November 1999¹¹, which stated that *records of business activity are public, and personal data included there are not a subject to the regulations of the PDPA*, it was quite clear that the personal data of individuals conducting business activity were not protected under the PDPA. The text of this regulation basically confirmed that information included in the register of business activity were personal data as understood in the PDPA. However, according to the accepted exclusion, they were not subject to that act¹². It was supported by the participation of a natural person who is acting as a business in economic turnover, the publicness of economic turnover as well as the fact that access to data included in the register of business activity would not exist with the rigour of PDPA¹³. When the regulation became valid, there was a lot of freedom in using information about businesses¹⁴. The exclusion accepted by the legislator was evaluated negatively¹⁵.

Since 1 January 2012, the situation has changed, as the revocation of Article 7a (2) BAA allowed the assumption that PDPA regulations also concerned information that identify businesses in economic turnover, provided that in the specific case they will constitute personal data as understood by Article 6 of the act¹⁶. According to this act, *all information regarding an identified or identifiable natural person is considered personal data. An identifiable person is a person whose identity can be determined directly or indirectly,*

⁶ Hereinafter, GODO.

⁷ E. KULESZA, Rzeczpospolita 27.10.1999, <http://www.godo.gov.pl> (27.05.2015).

⁸ Decision of GODO 1 September 2005, GI-DEC-DS-279/05. Legalis Numer 465569.

⁹ Hereinafter, NSA.

¹⁰ Judgement NSA 28 November 2002, II SA 3389/01, "Monitor Prawniczy" 2003, No. 3, item 99.

¹¹ Journal of Polish State Law 1999, No. 101, item 1178, Hereinafter, BAA.

¹² Judgement NSA 15 March 2010, I OSK 756/09, LEX 590310, "Glosa" 2010, No. 3, item 36

¹³ T. BIAŁEK, K. ZAJĄCZKOWSKA-WEREMCZUK, *Ochrona danych osobowych przedsiębiorcy będącego osobą fizyczną*, "Przegląd Ustawodawstwa Gospodarczego" 2007, No. 3, p. 25.

¹⁴ P. BARTA, P. LITWIŃSKI, *Dane osobowe przedsiębiorcy*, "Rzeczpospolita" 20.06.2011, <http://prawo.rp.pl/artykul/676350.html> (27.05.2015).

¹⁵ J. BARTA, P. FAJGIELSKI, R. MARKIEWICZ, *Ochrona danych osobowych. Komentarz*, Kraków 2007, p. 349.

¹⁶ P. BARTA, P. LITWIŃSKI, *Ustawa o ochronie danych osobowych. Komentarz*, Wydanie 2, Warszawa 2013, p. 68.

especially by reference to an identification number or a few specific factors determining their physical, physiological, mental, economic, cultural or social features. Information is not deemed as allowing a person to be identified if it would require excessive cost, time or effort. This means that all the information about a natural person that identifies them or can identify them falls under the regulations of the act. The essence of personal data is *information*. The lack of definition of this concept helps accept the general meaning of information as a message, expressed or written in any way, regardless of method, range and freedom of sharing and obtaining it¹⁷. Literature suggests an interdisciplinary understanding of information as a *transferable (immaterial) good reducing uncertainty*¹⁸. Therefore, personal data reduce the uncertainty regarding features (properties) of a given person, allowing them to be characterised in a more narrow or broad sense¹⁹. The catalogue of information enabling identification (allowing the identity of a given person to be determined) is not closed in its character, as personal data is a set of messages about a specific person, integrated to such an extent that it allows them to be individualised²⁰. It includes at least the information necessary to identify a person, such as first name and surname, as well as further information increasing the identification level, such as age, education, place of work, etc.²¹. A piece of information, in order to be protected, must: a) concern a natural person, b) whose identity is determined or possible to determine²². Therefore, there must be a correlation between the personal data and the natural person²³.

There is no doubt that the regulations of the act protect information of a personal nature, i.e. allowing the person they refer to be identified²⁴. It must be taken into consideration that the personal nature of information is inseparably connected with the context in which the information is used²⁵. It results from the phenomenon of the 'relativity of personal data', referring to a subjective assessment of the nature of the given information²⁶. With that in mind, evidently it should not be assumed which categories of information can be protected, and which should be excluded from the rigour of the PDPA²⁷. Such a perspective allows for further discussion on the status of the personal data of natural persons who are sole traders.

¹⁷ A. SZEWC, *Z problematyki...*, p. 23; J. BARTA, P. FAJGIELSKI, R. MARKIEWICZ, *Ochrona danych...*, p. 345 *et seq.*

¹⁸ G. SZPOR, *Pojęcie informacji a zakres danych osobowych*, [in:] *Ochrona danych osobowych w Polsce z perspektywy dziesięciolecia*, ed. P. FAJGIELSKI, Lublin 2008, p. 8.

¹⁹ S. HOC, T. SZEWC, *Ochrona danych osobowych i informacji niejawnych*, Wydanie 2, Warszawa 2014, p. 3.

²⁰ A. DROZD, *Ustawa o ochronie danych osobowych. Komentarz. Wzory pism i przepisy*, Warszawa 2004, p. 49.

²¹ A. SZEWC, *Z problematyki...*, p. 24.

²² J. BARTA, P. FAJGIELSKI, R. MARKIEWICZ, *Ochrona danych...*, p. 337 *et seq.*; R. STEFANICKI, *Znaczenie ustawy o ochronie danych osobowych z punktu widzenia przedsiębiorcy*, "Prawo Spółek" 1999, No. 7–8, p. 72.

²³ A. KRASUCKI, D. SKOLIMOWSKA, *Dane osobowe w przedsiębiorstwie*, Warszawa 2007, p. 32.

²⁴ R. STEFANICKI, *Znaczenie ustawy...*, p. 69.

²⁵ A. MEDNIS, *Ochrona danych osobowych w konwencji Rady Europy i dyrektywie Unii Europejskiej*, "Państwo i Prawo" 1997, No. 6, pp. 34–35.

²⁶ G. SIBIGA, *Postępowanie w sprawach ochrony danych osobowych*, Warszawa 2003, p. 37.

²⁷ P. LITWIŃSKI: *Przetwarzanie danych osobowych osoby fizycznej będącej przedsiębiorcą. Glosa do wyroku Naczelnego Sądu Administracyjnego z 15 marca 2010 r., (1 OSK 756/09)*, "Monitor Prawa Bankowego" 2011, No. 5, p. 33.

According to A. Mednis, a situation whereby a person launching a business activity loses or has limited rights to data protection if the data is identical to company data is unacceptable²⁸. This position was confirmed by the Chief Inspector for Personal Data²⁹. A separate issue is the name of the private partnership. According to the leading opinion, the name of a private partnership should not be considered personal data because it includes the names of the partners³⁰. It is believed that the name of a private partnership is not used to identify a natural person, because it is not considered information about a natural person³¹. An interesting issue is the sole trader's email address. As the Chief Inspector for Personal Data noted, the accepted definition of personal data states that personal data includes all information, even contextual, that communicates something about a given person, and that includes email addresses³². A criterion allowing it to be stated that an email address is considered personal data is, primarily, the proper extension. Using a person's first and last name, or their abbreviations, in the address, e.g. name.surname@poczta.pl surely facilitates identification, and as such allows the email address to be treated as information that can potentially be considered personal data³³. There are doubts when talking about addresses that include a nickname or pseudonym of a natural person, for example. They should not be arbitrarily disqualified as personal data, although in this case it is required to connect them with other information³⁴.

The recent amendment of the Act on Freedom of Business Activity of 2 July 2004³⁵, which came into force on 19 May 2016, has again changed the legal status of personal data of natural persons who are sole traders. According to the new Article 39b FBA, public data and information provided by CEIDG are not subject to the regulations of PDPA 29 August 1997. This means that most of the information included in CEIDG are public and are not protected under the data protection law, though the provisions related to the control of processing personal data by GODO and the security of data are binding.

3. GENERALLY ACCESSIBLE AND COMMONLY KNOWN PERSONAL DATA

The issue of public commercial registers, including CEIDG³⁶, has a significant influence on the division of personal data in PDPA since a subgroup of regular and

²⁸ A. MEDNIS, *Ustawa o ochronie danych osobowych w orzecznictwie sądowym – konsekwencje dla praktyki gospodarczej*, [in:] *Ochrona danych osobowych. Aktualne problemy i nowe wyzwania*, ed. X. KONARSKI, G. ŚIBIGA, Warszawa 2007, p. 228.

²⁹ Decision of GODO 18 April 2013, DOLiS/DEC-437/13, Legalis Numer 819471.

³⁰ See judgement SN 13 November 1997, SN I CKN 710/97, OSNC 1998, No. 4, item 69.

³¹ G. SZPOR, *Publicznoprawna ochrona danych osobowych*, "Przegląd Ustawodawstwa Gospodarczego" 1999, No. 12, p. 6; P. BARTA, P. LITWIŃSKI, 2013, p. 68; Judgement NSA II SA 3389/01.

³² Decision of GODO 24 April 2013, DOLiS/DEC-475/13/25648,25652, www.giodo.gov.pl.

³³ J. OŻEGALSKA-TRYBAŁSKA, *Adresy e-mailowe a dane osobowe*, ODO, Biuletyn ABI 2000, No. 23.

³⁴ W. ZIMNY, *Czy adresy e-mailowe są danymi osobowymi?* Ochrona Informacji, Biuletyn TISM 2002, No. 2.

³⁵ Act Amending the Act on the Freedom of Business Activity and Certain Other Acts of 25 September 2015 (Journal of Polish State Law 2015, item 1893).

³⁶ M. BILIŃSKI, M. ZURAWIK, *Zasady ogólne publicznego prawa gospodarczego*. In: *Publiczne Prawo Gospodarcze. System Prawa Administracyjnego*, Tom 8a, Warszawa 2013, pp. 35–36; T. STAWECKI, *Rejestry publiczne. Funkcje instytucji*, Warszawa 2005.

sensitive personal data includes data that is “publicly accessible” (Art. 47 (3) point 6 PDPA) and data that is “commonly accessible” (Art. 43 (1) point 9 PDPA). The academics tend to accept these notions as equivalent³⁷. Public accessibility means that access to data is given to an unlimited number of people, as in the case of various public collections and registers under the formal publicness rule. The notion of commonly accessible data refers to data included in datasets where an unlimited number of people can access it without significant effort or means. In Polish law, this data is not treated as ‘free’ data, but their public character is not unimportant from the perspective of data processing³⁸. With such a data category, it should be accepted that there is a lenience of legal obligations connected with processing it, yet it cannot be accepted as a separate legal premise that allows it to be processed³⁹. There are also different opinions. According to them, introducing regulations assuming the publicness of entries in commercial registers is enough to accept the publicness of personal data of a business entity that is a natural person, and therefore do not abide by PDPA regulations regarding their data⁴⁰.

Since 19 May 2016, all the information included in CEIDG has been public, with the exceptions of PESEL, date of birth, and place of residence if it is not the same as other addresses indicated in Article 25 (1) point 5 FBA, which are the place of performing business activity, and other contact data for the sole trader, such as email address, website address and telephone number, if that data were notified in the CEIDG application but the entitled person did not agree to make them accessible in CEIDG.

4. PROCESSING THE PERSONAL DATA OF A SOLE TRADER

There is a common opinion that if personal data of business entities is accessible through CEIDG, then it can be processed by any subject for any purpose without additional agreement of the interested party. This raises reasonable doubts, as data included in CEIDG, although public, are collected for a non-commercial purpose and the registered subject does not automatically agree to their data being processed by any interested subject. Article 23 of the PDPA introduces general material premises for processing personal data⁴¹. It should be noted that the fact that processed data comes from commonly accessible sources is not a legalising premise⁴². Processing data is possible as long as it “does not violate the rights and freedom of the person it concerns”⁴³. The basic right of such a person is the protection of their personal data. This is why it is so important that the administrator executes their informative duty to the people whose data is referred to (Art. 24 *et seq.* PDPA). Currently, in the light of the last novelisation, the provisions relating to the informative duty to the natural persons who are sole traders are not binding, especially if they are commonly known. It can be

³⁷ P. BARTA, P. LITWIŃSKI, *Ustawa o ochronie danych...*, p. 73.

³⁸ J. BARTA, P. FAJGIELSKI, R. MARKIEWICZ, *Ochrona danych...*, pp. 659 and 641.

³⁹ G. SIBIGA, *Postępowanie w sprawach...*, p. 40.

⁴⁰ D. FLESZER, *Zakres przetwarzania danych osobowych w działalności gospodarczej*, Warszawa 2008, p. 118

⁴¹ J. BARTA, P. FAJGIELSKI, R. MARKIEWICZ, *Ochrona danych osobowych. Komentarz*, Wydanie 6, Warszawa 2015, p. 399 *et seq.*

⁴² *Ibidem*, p. 402.

⁴³ Judgement WSA in Warsaw 22 January 2004, II Sa 2665/02, LEX nr 697724.

said that, since May 2016, there has been a kind of compromise. The data included in CEIDG is publicly accessible, but subjects that use them are obliged to keep appropriate security measures and, in accordance with that, should be ready for a potential GIODO inspection of the personal data processing (Art. 38 and 39–39 b FBA).

5. CONCLUSION

In the context of an open definition of personal data and accepting a broad understanding of the subject range of the PDPA⁴⁴, information about natural persons who conduct business activity should be treated as personal data, as it is frequently information allowing a specific natural person to be identified. On the other hand, publishing personal data of people with business activity in CEIDG forces the conclusion that the sole trader decides to make the data broadly accessible, and therefore is aware that its protection is limited. It should not mean that commonly accessible data can be processed absolutely freely with complete disregard for PDPA, as business entities also have a right to privacy. However, from a practical point of view, in their case this right is limited by the rule of the publicness of economic turnover. It can be noticed that the practice of economic turnover forces a more flexible approach to the presented issue⁴⁵. In this respect, since May 2016, the Act has introduced new provisions that are intended to ensure a realistic balance between the business entity's and public interest. The purpose of the amendment of the Act on Freedom of Business Activity, adopted in September 2015, is primarily to accelerate the service of undertakings. Undoubtedly, in the content of the business entity's data the revision of the Act introduced provisions broadening the scope of data contained in the CEIDG entry. The main changes that came into force can certainly stir up controversies. It is difficult to explicitly declare whether those legal solutions are effective and positive. Certainly, introducing regulations excluding the PDPA regarding the personal data of a sole trader, assuming the public nature of the overwhelming majority of their data, results in a situation in which they are not properly protected.

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⁴⁴ M. JACKOWSKI, Gloss to judgment of NSA 28 November 2002, II SA 3389/01, "Państwo i Prawo" 2004, No. 10, pp. 126–131.

⁴⁵ A. MEDNIS, *Ustawa o ochronie danych osobowych w orzecznictwie sądowym...*, p. 228.

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- Dokument W jaki sposób agencja reklamowa może przeprowadzić zgodnie z ustawą o ochronie danych osobowych akcję promocyjną, polegającą na zebraniu adresów e-mail i przekazaniu ich swojemu klientowi do celów marketingowych? czy można wysyłać informacje na adresy e-mail, które znajdują się w posiadanej bazie danych, bez pozyskiwania każdorazowo zgody osób, do których kierowana będzie korespondencja? <http://www.giodo.gov.pl> (15.10.2015).
- KULESA E., "Rzeczpospolita" 27.10.1999, <http://www.giodo.gov.pl> (15.10.2015).